APPEAL NO. 010135

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 14, 2000. With regard to the four issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that the claimant did not have disability; and that the respondent (carrier) is relieved from liability under Sections 409.001 and 409.004 because the claimant failed to timely notify the employer of her injury and failed to timely file her claim with the Texas Workers' Compensation Commission (Commission) within one year of the date of injury.

The claimant appeals, repeating and expanding on her testimony and evidence at the CCH. The carrier responds, urging affirmance.

DECISION

Affirmed.

The claimant was employed as the acting, or assistant, manager of a pawn shop (employer). The claimant testified that she injured her low back moving some stereo components on _____, and that she reported the injury to her supervisor, Mr. H, on either _____ or the following _____. The hearing officer commented, in the Discussion portion of his decision, that the claimant "equivocated as to whether she actually told [Mr. H] she was injured on the job." The claimant said that she reported the injury again on _____ before going to the doctor. A brief written statement by Mr. H says that the claimant "reinjured her back on Monday"; that he helped the claimant to her car; and that he called Mr. BW, employer's owner, and reported the incident to Mr. BW. This is denied by Mr. BW. The claimant saw Dr. W and a progress note of January 13, 1997, recited a history of lifting some stereo equipment and had an impression of lumbar strain. The claimant saw Dr. W again on January 16, 1997, apparently mainly for a nonwork-related fever, but Dr. W, in the progress note of that date, comments that the claimant's lumbar spasm and strain "has improved." The claimant paid for these visits through group health insurance and paid a copay. There is no other medical evidence regarding the claimant's low back injury between January 16, 1997, and December 26, 1999. The claimant testified that during the interval she was "babying" her back injury.

There was considerable testimony as to what happened during the intervening time between January 1997 and December 1999, including the fact that the claimant and Mr. H were friends; that Mr. H was terminated for theft in February 1999; and that the claimant was promoted to store manager and received a raise. The claimant had also been seen by several doctors for a cervical condition and had cervical surgery in May 2000. On March 22, 2000, a lumbar MRI showed disc dessication at L4-5 and L5-S1 with a small lateral disc protrusion at L4-5. In April 2000, the claimant called the Commission to inquire about her case and the Commission sent the claimant an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), which was apparently

completed on May 7, 2000, but was not filed with the Commission until July 19, 2000. Physical therapy notes of April 11, 2000, indicate that the onset of the claimant's "L5,S1 herniated disc" was November 26, 1999. The claimant denies any additional injury in November 1999. The claimant was demoted in June 2000, was subsequently reprimanded, and eventually terminated on August 28, 2000.

Regarding the issue of injury, the hearing officer, as the sole judge of the weight and credibility to be given to the evidence, could disbelieve the claimant's testimony, Mr. H's statement, and Dr. W's progress note, which he apparently did. Although a different fact finder could have reached a different conclusion on the same facts that is not a sufficient basis for us to reverse the hearing officer's decision. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). We find the hearing officer's decision on this issue as minimally supported by the evidence and affirm the hearing officer's decision on the question of injury. With regard to disability, in that we are affirming the hearing officer's decision that the claimant had not sustained a compensable injury, the claimant cannot by definition in Section 401.011(16) have disability.

Similarly, on the issue of timely reporting to the employer, the hearing officer could disbelieve the claimant's testimony and Mr. H's statement and find that the claimant had not reported a work-related injury to the employer within 30 days of _____. The hearing officer, in his Discussion, comments that the carrier offered testimony of Mr. BW, to the effect that "he had never received a report of an on-the-job injury concerning the claimant until this dispute arose in 2000." While that may be true, we note that Section 409.001 only requires that notice be given to the employer or someone who holds a supervisory or management position, which Mr. H certainly had. However, the hearing officer could believe that the claimant had not reported a work-related injury and the hearing officer's Discussion makes clear that he was not persuaded by the claimant's testimony.

On the issue of timely filing of the claim, the hearing officer commented on some of the testimony regarding some facts of "marginal relevance" and concluded that evidence was "of no import as to the issue of the claimant's own failure to file her claim with the Commission until July 19, 2000. That failure was not persuasively and sufficiently explained by the claimant, and of itself is sufficient to defeat the present claim."

The ombudsman, in closing argument, addressed this issue by specifically citing Section 409.008 which states:

> If an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to . . . an employee and the employer or insurance carrier fails, neglects, or refuses to file the report under Section 409.005, the period for filing a claim for compensation under Sections 409.003 and 409.007 does not begin to run against the claim of an injured employee . . . until the day on which the report required under Section 409.005 has been furnished.

However, in that we are affirming the hearing officer's decision that the claimant never gave notice of her claimed injury to the employer (disputed by the claimant), Section 409.008 is not applicable as it only applies where the employer or the carrier has been given notice, or has knowledge of the claimed injury.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge